

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ALAN RAY HANDY,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

Case No. 3:13-cv-05937-BHS-KLS

REPORT AND RECOMMENDATION  
GRANTING PLAINTIFF'S MOTION FOR  
ATTORNEY FEES, COSTS AND  
EXPENSES

Noted for November 14, 2014

This case has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636(b)(1) and Local Rule MJR 3 and 4. This matter comes before the Court on plaintiff's filing of a motion for attorney fees in the amount of \$7,147.19, costs in the amount of \$400.00 and expenses in the amount of \$59.12 pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. After reviewing plaintiff's motion, defendant's response to that motion, plaintiff's reply thereto, and the remaining record, the Court finds that for the reasons set forth below plaintiff's motion should be granted.

FACTUAL AND PROCEDURAL HISTORY

On July 1, 2014, the undersigned issued a Report and Recommendation, recommending that defendant's decision to deny plaintiff's application for disability insurance benefits be reversed and that this matter be remanded for further administrative proceedings, because the ALJ failed to provide valid reasons for discounting plaintiff's credibility. See ECF #16. That

Report and Recommendation was adopted by the Court on July 23, 2014. See ECF #17. As defendant has filed her response to plaintiff's motion, and plaintiff has filed his reply thereto, this matter is now ripe for the Court's review.

#### DISCUSSION

The EAJA provides in relevant part:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). Thus, to be eligible for attorney fees under the EAJA: (1) the claimant must be a "prevailing party"; (2) the government's position must not have been "substantially justified"; and (3) no "special circumstances" exist that make an award of attorney fees unjust. Commissioner, Immigration and Naturalization Service v. Jean, 496 U.S. 154, 158 (1990).

In Social Security disability cases, "[a] plaintiff who obtains a sentence four remand is considered a prevailing party for purposes of attorneys' fees." Akopyan v. Barnhart, 296 F.3d 852, 854 (9th Cir. 2002) (citing Shalala v. Schaefer, 509 U.S. 292, 301-02 (1993)).<sup>1</sup> Such a

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<sup>1</sup> Section 405(g) of Title 42 of the United States Code "authorizes district courts to review administrative decisions in Social Security benefit cases." Id., 296 F.3d at 854. Sentence four and sentence six of Section 405(g) "set forth the exclusive methods by which district courts may remand [a case] to the Commissioner." Id. "The fourth sentence of § 405(g) authorizes a court to enter 'a judgment affirming, modifying, or reversing the decision of the [Commissioner], with or without remanding the cause for a rehearing.'" Melkonyan v. Sullivan, 501 U.S. 89, 98 (1991); see also Akopyan, 296 F.3d at 854 (sentence four remand is "essentially a determination that the agency erred in some respect in reaching a decision to deny benefits.") A remand under sentence four thus "becomes a final judgment, for purposes of attorneys' fees claims brought pursuant to the EAJA, 28 U.S.C. § 2412(d), upon expiration of the time for appeal." Akopyan, 296 F.3d at 854. A sentence six remand, on the other hand, "may be ordered in only two situations: where the Commissioner requests a remand before answering the complaint, or where new, material evidence is adduced that was for good cause not presented before the agency." Id. Accordingly, "[u]nlike sentence four remands, sentence six remands do not constitute final judgments." Id. at 855. Instead, "[i]n

1 plaintiff is considered a prevailing party even when the case is remanded for further  
2 administrative proceedings. Id. There is no issue here as to whether plaintiff is a prevailing party  
3 given that as discussed above, this case was remanded for further administrative proceedings.  
4 Nor is there any assertion of special circumstances making an award of attorney's fees unjust.  
5 Rather, defendant argues the government's position was substantially justified. The undersigned  
6 disagrees.

7  
8 As noted above, to be entitled to attorney fees under the EAJA, defendant's position must  
9 not be "substantially justified." Jean, 496 U.S. at 158. Normally, for defendant's position to be  
10 "substantially justified," this requires an inquiry into whether defendant's conduct was "'justified  
11 in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person"  
12 – and "had a 'reasonable basis both in law and fact.'" Gutierrez v. Barnhart, 274 F.3d 1255, 1258  
13 (9th Cir. 2001) (quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988)); Penrod v. Apfel, 54  
14 F.Supp.2d 961, 964 (D. Ariz. 1999) (citing Pierce, 487 U.S. at 565); see also Jean, 496 U.S. at  
15 158 n.6; Flores v. Shalala, 49 F.3d 562, 569-70 (9th Cir. 1995). As such, this "does not mean  
16 'justified to a high degree.'" Corbin v. Apfel, 149 F.3d 1051, 1052 (9th Cir. 1998) (quoting  
17 Pierce, 487 U.S. at 565). On the other hand, "the test" for substantial justification "must be more  
18 than mere reasonableness." Kali v. Bowen, 854 F.2d 329, 331 (9th Cir. 1988).

19  
20 Defendant has the burden of establishing substantial justification. See Gutierrez, 274 F.3d  
21 at 1258. Defendant's position must be "*as a whole*, substantially justified." Gutierrez, 274 F.3d  
22 at 1258-59 (emphasis in original). That position also "must be 'substantially justified' at 'each  
23 stage of the proceedings.'" Corbin, 149 F.3d at 1052 ("Whether the claimant is ultimately found  
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26 sentence six cases, the filing period [for motions for EAJA attorney's fees] does not begin until after the postremand proceedings are completed, the Commissioner returns to court, the court enters a final judgment, and the appeal period runs.'" Id. (citing Melkonyan, 501 U.S. at 102).

1 to be disabled or not, the government's position at each [discrete] stage [in question] must be  
 2 'substantially justified.'") (citations omitted); see also Hardisty v. Astrue, 592 F.3d 1072, 1078  
 3 (9th Cir. 2010) ("[D]istrict courts should focus on whether the government's position on the  
 4 particular issue on which the claimant earned remand was substantially justified, not on whether  
 5 the government's ultimate disability determination was substantially justified."). Accordingly,  
 6 the government must establish that it was substantially justified both in terms of "the underlying  
 7 conduct of the ALJ" and "its litigation position defending the ALJ's error." Gutierrez, 274 F.3d  
 8 at 1259. As the Ninth Circuit further explained:

10 The plain language of the EAJA states that the "'position of the United States'  
 11 means, in addition to the position taken by the United States in the civil  
 12 action, the action or failure to act by the agency upon which the civil action is  
 13 based." 28 U.S.C. § 2412(d)(2)(D); *Jean*, 496 U.S. at 159, 110 S.Ct. 2316  
 14 (explaining that the "position" relevant to the inquiry "may encompass both  
 15 the agency's prelitigation conduct and the [agency's] subsequent litigation  
 16 positions"). Thus we "must focus on two questions: first, whether the  
 government was substantially justified in taking its original action; and,  
 second, whether the government was substantially justified in defending the  
 validity of the action in court." *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir.  
 1988).

17 Id.; see also Kali, 854 F.2d at 332 (noting government's position is analyzed under "totality of  
 18 the circumstances" test)<sup>2</sup>; Thomas v. Peterson, 841 F.2d 332, 334-35 (9th Cir. 1988). Indeed, the  
 19 Ninth Circuit has explicitly stated that "[i]t is difficult to imagine any circumstance in which the  
 20 government's decision to defend its actions in court would be substantially justified, but the  
 21 underlying decision would not." Sampson, 103 F.3d at 922 (quoting Flores, 49 F.3d at 570 n.11).

23 The EAJA does create "a presumption that fees will be awarded unless the government's  
 24 position was substantially justified." Thomas, 841 F.2d at 335; see also Flores, 49 F.3d at 569

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26 <sup>2</sup> As the Ninth Circuit put it in a later case: "[i]n evaluating the government's position to determine whether it was substantially justified, we look to the record of both the underlying government conduct at issue and the totality of circumstances present before and during litigation." Sampson v. Chater, 103 F.3d 918, 921 (9th Cir. 1996).

1 (noting that as prevailing party, plaintiff was entitled to attorney's fees unless government could  
2 show its position in regard to issue on which court based its remand was substantially justified).  
3 Nevertheless, "[t]he government's failure to prevail does not raise a presumption that its position  
4 was not substantially justified." Kali, 854 F.2d at 332, 334; Thomas, 841 F.2d at 335.

5 Defendant argues the government's position in defending this matter was substantially  
6 justified, because the ALJ's credibility determination had a reasonable basis in both fact and law.  
7 Substantial justification will not be found where the government defends "on appeal . . . 'basic  
8 and fundamental' procedural mistakes made by the ALJ." Lewis v. Barnhart, 281 F.3d 1081,  
9 1085 (9th Cir. 2002) (quoting Corbin, 149 F.3d at 1053). In Corbin, the Ninth Circuit found "the  
10 failure to make [specific] findings" and "weigh evidence" to be "serious" procedural errors,  
11 making it "difficult to justify" the government's position on appeal in that case. Corbin, 149 F.3d  
12 at 1053. In Shafer v. Astrue, 518 F.3d 1067, 1072 (9th Cir. 2008), the Ninth Circuit found the  
13 ALJ "committed the same fundamental procedural errors" noted in Corbin in failing "to provide  
14 clear and convincing reasons for discrediting [the claimant's] subjective complaints," and "to  
15 make any findings regarding" the diagnosis of a non-examining medical expert. The Court of  
16 Appeals went on to find the ALJ committed additional procedural errors not present in Corbin,  
17 including rejecting "a treating physician's opinion in favor of a non-treating physician's opinion  
18 without providing clear and convincing reasons." Id.

19 The errors committed by the ALJ in this case are of the same level of seriousness. The  
20 ALJ discounted plaintiff's credibility on the basis that the degree of severity of limitation alleged  
21 was inconsistent with the objective medical evidence in the record, that the record failed to  
22 definitively show plaintiff had a flare up in his multiple sclerosis after his initial diagnosis of that  
23 condition, that plaintiff failed to pursue treatment for his condition, that plaintiff's condition was  
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1 satisfactorily controlled with marijuana, and that plaintiff failed to report his hand pain and  
 2 numbness to one of his treatment providers. Except for the failure to pursue medical treatment,<sup>3</sup>  
 3 the undersigned agrees with defendant that the government's position had a reasonable basis in  
 4 law, given that these can form valid bases for discounting plaintiff's credibility.<sup>4</sup> The problem for  
 5 defendant, though, is that none of them – except for inconsistency with the objective medical  
 6 evidence – had a reasonable basis in fact for the reasons explained in the Report and  
 7 Recommendation, and inconsistency with objective medical evidence alone is not a valid basis  
 8 for discounting a claimant's credibility.<sup>5</sup>

10 Defendant asserts that “when a case is remanded without a finding of disability because  
 11 the reviewing court finds the ALJ's explanation inadequate, ‘the lines of demarcation are not  
 12 clear, and in the vast majority of cases, a position defending a final administrative decision  
 13 despite its imperfections will be justified.’” ECF #20, p. 3 (quoting DeLong v. Commissioner of  
 14 Social Sec. Admin., 748 F.3d 723, 728 (6th Cir. 2014) (citation omitted)). But unlike in DeLong,  
 15 the problem with the ALJ's stated reasons for discounting plaintiff's credibility was not that they  
 16 were justified yet inadequately explained, but that they did not rise to the level of clear and  
 17 convincing based on both errors of law and fact as explained above. See id. at 727 (holding that  
 18 “an ALJ's failure to provide an adequate explanation for his findings does not establish that a  
 19 denial of benefits lacked substantial justification,” and that “[a] fully justified position may be  
 20 poorly explained, and remand may be the most appropriate vehicle for elucidating that  
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23 <sup>3</sup> As discussed in the Report and Recommendation, the ALJ erred in discounting plaintiff's credibility on this basis  
 24 without first considering any valid reasons for this failure, where the evidence in the record indicates such reasons  
 25 may exist. See Carmickle v. Commissioner, Social Sec. Admin., 533 F.3d 155, 1162 (9th Cir. 2008).

26 <sup>4</sup> See Recogennitter v. Commissioner of Social Sec. Admin., 166 F.3d 1294, 1297 (9th Cir. 1998) (credibility may  
 be discounted based on inconsistency with clinical observations); Morgan v. Commissioner of Social Sec. Admin.,  
 169 F.3d 595, 599 (9th Cir. 1999) (credibility may be discounted on basis of medical improvement); Fair v. Bowen,  
 885 F.2d 597, 603 (9th Cir. 1989) (failure to assert good reason can cast doubt on claimant's severity).

<sup>5</sup> See Orteza v. Shalala, 50 F.3d 748, 749-50 (9th Cir. 1995).

position”).

## CONCLUSION

For all of the foregoing reasons, the undersigned finds the government’s position in defending this matter was not substantially justified. Accordingly, as defendant does not contest the reasonableness of plaintiff’s request, the undersigned recommends that his motion for attorney’s fees in the amount of \$7,147.19,<sup>6</sup> costs in the amount of \$400.00 and expenses in the amount of \$59.12 (see ECF #19) be granted.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have **fourteen (14) days** from service of this Report and Recommendation to file written objections thereto. See also Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the Clerk is directed set this matter for consideration on **November 14, 2014**, as noted in the caption.

DATED this 29 day of October, 2014.



Karen L. Strombom  
United States Magistrate Judge

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<sup>6</sup> This includes plaintiff’s request for an additional \$702.19 in attorney fees for replying to defendant’s response to his motion. See ECF #21; Jean, 496 U.S. at 161-62 (stating that “absent unreasonably dilatory conduct by the prevailing party in ‘any portion’ of the litigation, which would justify denying fees for that portion, a fee award presumptively encompasses all aspects of the civil action,” and that “the EAJA – like other fee-shifting statutes – favors treating a case as an inclusive whole”) (citing Sullivan v. Hudson, 490 U.S. 877, 888 (1989) (stating that where administrative proceedings are “necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded”).